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CITATIONS

627014—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 559

FEDERAL TRADE COMMISSIONER, PETITIONER

v.

A. E. STALEY MANUFACTURING COMPANY AND STALEY SALES CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Circuit Court of Appeals on the first hearing before it (R. 45–48) is reported in 135 F. (2d) 453; the opinions on the second hearing (R. 68–84) are reported in 144 F. (2d) 221.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on July 6, 1944 (R. 84). Petition for writ of certiorari was filed October 6, 1944, and

was granted November 20, 1944. The jurisdiction of this Court is invoked under Section 11 of the Clayton Act, 32 Stat. 734, 15 U. S. C. 21, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether respondents, who adopted the discriminatory price system used by their competitors—sale at delivered prices based on Chicago irrespective of actual place of manufacture and shipment—succeeded in justifying their price system under Section 2 (b) of the Clayton Act by their attempt to show that their prices were made in good faith to meet equally low prices of competitors.

(2) Whether respondents, in granting discriminatory prices without inquiry into the facts, upon the unsupported verbal statement of buyers that competitors were offering like discriminations, acted "in good faith" to meet a competitor's price within the meaning of Section 2 (b).

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Act of June 19, 1936, 49 Stat. 1526, 15 U. S. C. 13, provides in part:

> (a) It shall be unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of com-

modities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in

bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

In this proceeding brought under Section 11 of the Clayton Act, the Federal Trade Commission

charged respondents with discriminating in price between different purchasers of commodities of like grade and quality in violation of Section 2 of that Act as amended by the Robinson-Patman Act of June 19, 1936 (R. 1–4). The case was heard on stipulations and exhibits (R. 27–28). After the Commission had made findings of fact (R. 28–35) and had entered a cease and desist order (R. 36–37) the court below, on a petition to review the order, held that certain essential elements of the charge against respondents were not covered by the findings and remanded the case for further findings and, if necessary, for a further hearing (R. 45–48). The Commission thereafter made modified findings (R. 50–64), of which the following are pertinent:

Respondents manufacture corn syrup, commonly called glucose, at their plant at Decatur, Illinois, all shipments being made from Decatur (R. 50, 51). Their plant has a capacity of about 50,000 bushels of corn per day. For many years they have sold glucose to purchasers strictly on a delivered-price basis, the lowest price quoted being the price in Chicago. Respondents' price at Chicago is not only a delivered price at that place; it is also a base price from which all other delivered prices, including the price at Decatur, are calculated by adding freight from Chicago. (R. 50, 51.) The following table gives the delivered prices charged by respondents at various times and

places for one hundred pounds of 43° glucose in railroad tank-car quantities (R. 51).

Location of purchaser	Aug. 1, 1936	Aug. 1, 1937	Aug. 1, 1938	Aug. 1, 1939
Chicago, Ill	$2.94	$3.04	$2.29	$2.09
Decatur, Ill	3.11	3.20	2.47	2.27
Centralia, Ill	3.11	3.20	2.47	2.27
St. Louis, Mo	3.11	3.20	2.47	2.27
Davenport, Iowa	3.11	3.20	2.46	2.27
St. Joseph, Mo	3.32	3.40	2.69	2.49
Kansas City, Mo	3.32	3.40	2.69	2.49
Little Rock, Ark	3.52	3.59	2.89	2.69
Alexandria, La	3.54	3.60	2.90	2.78
Shreveport, La	3.63	3.69	3.00	2.88
Farmersville, Tex	3.68	3.74	3.06	2.86
Dallas, Tex	3.72	3.77	3.09	2.89

Since June, 1936, similar price differentials have existed at all times at places named, and also at other locations, varying according to the varying freight rates to the several destinations (R. 51). Since freight rates from Chicago and those from Decatur to the same destinations differ, the result has been that at some locations buyers pay imaginary or "phantom" freight costs while at other locations they pay only part, or, as at Chicago, none of the actual freight costs. Consequently, while this system of fixing prices generally has made some allowance for the cost of delivery, that allowance has had no relation to the difference in cost of delivery from any place other than Chicago, where neither respondents nor many of their competitors have any plant. (R. 51–52.) As a result respondents have made it a systematic policy to avoid making due allowanee for differences in their actual costs of delivery from Decatur.

The following table shows the price at which actual sales were made by respondents to certain manufacturers of table syrup and candy located in Chicago compared with substantially concurrent sales to certain manufacturers of table syrup and candy located at other points, the difference in delivered prices, the freight rates from Decatur to Chicago and from Decatur to the point of delivery, and the net difference not due to difference in cost of delivery (R. 52–53).

Location of purchaser	Delivered prices	Price difference (freight from Chicago)	Freight rates from Decatur	Delivered prices, less cost of delivery	Net difference not due to cost of delivery
St. Louis, Mo	$3.20	$0.16	$0.10	$3.10	$0.20
Chicago, Ill	3.04		.14	2.90	
St. Louis, Mo	2.15	.06	.11	2.04	.105
Chicago, Ill	2.09		.155	1.935	
St. Louis, Mo	2.16	.07	.11	2.05	.115
Chicago, Ill	2.09		.155	1.935	
Davenport, Ia	3.20	.16	.134	3.066	.166
Chicago, Ill	3.04		.14	2.90	
Davenport, Ia	2.27	.18	.14	2.13	.116
Chicago, Ill	2.09		.155	1.935	
Ottumwa, Ia	2.73	.29	.27	2.46	.17
Chicago, Ill	2.44		.15	2.29	
Ottumwa, Ia	2.39	.30	.27	2.12	.185
Chicago, Ill	2.09		.155	1.935	
Sioux City, Ia	3.50	.46	.36	3.14	.24
Chicago, Ill	3.04		.14	2.90	
St. Joseph, Mo	3.42	.38	.35	3.07	.18
Chicago, Ill	3.04		.15	2.89	
St. Joseph, Mo	3.40	.36	.35	3.05	.15
Chicago, Ill	3.04		.14	2.90	
St. Joseph, Mo	2.49	.40	.36	2.13	.195
Chicago, Ill	2.09		.155	1.935	
Kansas City, Mo	3.50	.46	.325	3.175	.275
Chicago, Ill	3.04		.14	2.90	
Kansas City, Mo	2.49	.40	.36	2.13	.195
Chicago, Ill	2.09		.155	1.935	
Little Rock, Ark	3.63	.59	.535	3.095	.295
Chicago, Ill	3.04		.15	2.89	
Little Rock, Ark	3.59	.55	.50	3.09	.19
Chicago, Ill	3.04		.14	2.90	
Shreveport, La	3.69	.65	.61	3.08	.18
Chicago, Ill	3.04		.14	2.90	
Shreveport, La	2.74	.80	.67	2.07	.085
Chicago, Ill	2.14		.155	1.985	

Location of purchaser	Delivered prices	Price difference (freight from Chicago)	Freight rates from Decatur	Delivered prices, less cost of delivery	Net difference not due to cost of delivery
Shreveport, La	$2.80	$0.61	$0.67	$2.13	$.095
Chicago, Ill	2.19		.155	2.035	
Dallas, Tex	3.77	.73	.73	3.04	.14
Chicago, Ill	3.04		.14	2.90	
Dallas, Tex	3.77	.73	.68	3.09	.19
Chicago, Ill	3.04		.14	2.90	
Dallas, Tex	2.89	.80	.75	2.14	.205
Chicago, Ill	2.09		.155	1.935	
Dallas, Tex	2.94	.85	.78	2.19	.255
Chicago, Ill	2.09		.155	1.935	
Farmersville, Tex	3.01	.77	.72	2.29	.205
Chicago, Ill	2.24		.155	2.085	
Farmersville, Tex	2.96	.77	.72	2.24	.205
Chicago, Ill	2.19		.155	2.035	
Decatur, Ill	2.42	.18	.00	2.42	.335
Chicago, Ill	2.24		.155	[1] 2.085	

[1] In order to put all prices shown in the above table upon a strictly comparable basis, adjustments were made in some instances according to respondents' established scale for differences of specific gravity of glucose and difference in type of customer, but in other instances no adjustments were necessary (R. 53).

After making allowance for the cost of delivery, purchasers of respondents' glucose in Chicago have received a price differential per one hundred pounds over purchasers in other cities as follows (R. 52–53):

Decatur, Illinois	33½¢
Kansas City, Missouri	19½¢ to 27½¢
Dallas, Texas	14¢ to 25½¢
Sioux City, Iowa	24¢
St. Louis, Missouri	10½¢ to 20¢
Little Rock, Arkansas	19¢ to 20½¢

Purchasers in other cities have been subjected to similar price disadvantages (R. 51).

Respondents also discriminate in price in other ways. During a period of from 5 to 10 days after an advance in prices purchasers may "book" at the old price for delivery within 30 days quantities of glucose sufficient to meet their needs dur-

ing that period and thereby secure an option to buy at the lower price. These "bookings" are not firm contracts of purchase, and delivery may or may not be taken at the buyer's option, depending on the subsequent course of the market. This concession applies to all buyers alike but purchasers of large quantities may secure an extension of the time of delivery to 60 or 90 days, and sometimes to 120 days. As a result of such extensions of time granted to favored buyers and not to others, respondents sell glucose to some buyers at a lower price than they concurrently are charging others. (R. 53–54.) Another form of discrimination in price results from the practice of making fictitious bookings after a price advance and later converting these into actual sales. In other instances, without any pretended booking, sales at the old and lower price are made to favored purchasers long after the booking period has expired. Respondents also "book" glucose in tank-car lots to purchasers lacking storage facilities for such a quantity, and, after adding the usual differential, make deliveries in tank-wagon lots over a period of many months, during which they are selling to others at higher prices. (R. 54.) Respondents' stipulated evidence was that these booking practices were engaged in to meet the competition of others who were reported to have granted such differentials in price (R. 21–22); but the evidence conceded that this in-

formation was unsupported except by the verbal statement of the buyer or buyers (R. 22–23), and the Commission found that respondents, having failed to exercise diligence to verify these unsupported statements of buyers who as a class notoriously seek to obtain the most advantageous possible prices, had not sustained the burden of justifying their discriminatory "booked" prices as set in good faith to meet the equally low prices of a competitor. (R. 60–61.)

The price discriminations resulting from the various booking practices described above have amounted to from 5 to 55 cents per hundred pounds (R. 54).

Glucose is used extensively in the manufacture of table syrups and candy. As used by customers of respondents in making table syrup it constitutes about 85% of the finished product and is a large factor in the total cost of such syrup. A syrup mixer may attract customers and divert trade by selling syrup at 5 cents per sixty-pound case less than the price of competitors (R. 54, 56).

In candies, glucose makes up from 5 to 90% of the weight of the product. It is used in the largest proportions in low-priced candies which are sold by the manufacturer at a few cents per pound and on a narrow margin of profit. Frequently such candies are unbranded and a difference of $\frac{1}{8}$ cent per pound, or $12\frac{1}{2}$ cents per one hundred pounds, is sufficient to divert purchases

from one manufacturer to another. This is particularly true of sales to chain stores and to other purchasers who buy in large quantities. (R. 55–56.) Customers of respondents who manufacture candy sell their product in interstate commerce to wholesalers, chain stores and retailers who compete among themselves and with other manufacturers for the available business (R. 55).

The base price for 43° glucose in Chicago ranged from $2.09 to $3.59 per hundred pounds during the period from June 19, 1936 to December 5, 1939. As the discrimination in price resulting from the "booking" practice in some cases was as high as 55 cents per hundred pounds, this practice at times resulted in some purchasers paying respondents from 15 to 25% more than competing purchasers concurrently paid for a raw material which constituted a substantial and frequently a major part of the total raw material cost of such customers. To this, in many cases, should be added discriminations due to the pricing formula which constantly favored purchasers in certain cities over purchasers in other cities. (R. 61–62.) As a result of these discriminations the ability of non-favored purchasers to compete with those who are favored is seriously affected (R. 62). Consequently, the discriminations in price granted by respondents by their pricing and booking systems may substantially lessen competition and tend to create a monopoly in the manufacture,

sale and distribution of candy and table syrups containing glucose in substantial proportions, and to injure, destroy and prevent competition with the grantors and recipients of the benefits of such discriminations (R. 63).

The Commission found pursuant to the stipulated facts that the discriminations reduced the incentive or desire and the ability of candy manufacturers and table syrup mixers in the cities discriminated against to compete with those in the cities having the benefit of the discriminations, and also that such discriminations were sufficient to deter potential competitors in those products from engaging in business at the places discriminated against. (R. 55–56.)

On again coming before the court below the order of the Commission was set aside, Judge Evans dissenting. Three opinions were delivered. Judge Minton took the position that there is substantial evidence in the record to support the finding that the basing-point and booking practices of respondents were discriminatory and tended substantially to lessen competition or create a monopoly, and concluded that the Commission made out a prima facie case of discrimination; but held that inasmuch as the basing-point and the booking systems were in general use in the glucose trade when respondents went into business they adopted these systems in good faith to meet the competitive situation, and he concluded

that this is sufficient to justify the discrimination (R. 68–73). Judge Major concurred in the result, on the ground that the Commission failed to make out a case of unlawful price discrimination and that for that reason there is no occasion to decide the merits of respondents' defense. In his opinion the law did not proscribe the use of the basing-point system (R. 78–84); he did not discuss the booking practices. Judge Evans, dissenting, agreed with Judge Minton that the basing-point system as practiced by Staley was discriminatory and worked to substantially lessen competition and tended to create a monopoly. He was of opinion, however, that respondents had not successfully shown, in defense, that the discrimination resulted from the granting of low prices in good faith to meet the equally low prices of a competitor (R. 73–77).

SUMMARY OF ARGUMENT

1. The court below recognized that respondents' use of a basing-point system of delivered prices is discriminatory, since the delivered prices include fictitious freight from Chicago and hence reflect differences which are not related to differences in cost of transportation. In holding, however, that the discrimination was justified under Section 2(b) of the Clayton Act as amended by the Robinson-Patman Act, the court erroneously applied to the facts of this case the statutory proviso dealing with prices established

in good faith to meet the equally low price of a competitor. Respondents' system of delivered prices based on Chicago was established to produce delivered prices identical with those of competitors, who also used that system. In the great majority of destinations disclosed by the record, respondents in Decatur had a freight advantage over their competitors in Chicago, and hence in basing their prices on Chicago respondents were discriminating in order to meet the equally high delivered prices of competitors. Moreover, on various occasions, changes have been initiated in respondents' prices independently of changes by competitors. Also, respondents' prices have been increased with increases in freight rates from Chicago, while the freight rates from Decatur decreased. All the evidence taken together amply supports the Commission's finding that respondents' discriminatory prices were not the result of the establishment in good faith of a low price to meet the equally low price of a competitor, within Section 2(b) of the Act.

The legislative history of the proviso in Section 2 (b) indicates that it is to be strictly construed and applied. It was adopted as a result of dissatisfaction with the breadth of the corresponding provision in the Clayton Act, which permitted justification where prices were established "to meet competition".

2. The so-called booking practices of respondents discriminate in favor of certain purchasers,

generally the larger buyers, who are permitted to purchase at former prices after a price advance is made. Respondents' evidence to justify this discrimination consisted of a statement that such price advantages were granted when reports came to respondents from salesmen or buyers that competing producers were granting similar price advantages. Admittedly, these reports were uncorroborated, and respondents made no inquiry to verify the reports and offered no evidence supporting their trustworthiness. Apart from the issue whether respondents could justifiably discriminate to meet illegal price discriminations of competitors, the evidence itself was properly found by the Commission not to sustain the burden of proof resting on respondents to show that their action was taken in good faith within the meaning of Section 2 (b). The court below erred in substituting its appraisal of the evidence and its criterion of good faith for that of the Commission.

ARGUMENT

RESPONDENTS HAVE NOT SHOWN THAT THEIR PRICE DISCRIMINATIONS, WHETHER RESULTING FROM THEIR BASING-POINT PRICE SYSTEM OR FROM THEIR BOOKING PRACTICES, WERE MADE IN GOOD FAITH TO MEET EQUALLY LOW PRICES OF COMPETITORS

1. INTRODUCTORY

The court below held that there was substantial evidence to support the finding of the Commission that respondents discriminated in price between

different purchasers by using a basing-point price system and by engaging in so-called booking practices. The court also sustained the Commission's finding that these discriminations were such as may substantially lessen competition or tend to create a monopoly. The only question presented by the petition in this Court is whether the respondents succeeded, as the court below held, in rebutting the prima facie case made by the Commission within the proviso of Section 2 (b) of the Clayton Act, *supra,* p. 4, as amended by the Robinson-Patman Act, that "nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *." As respondents stated in their brief in opposition to certiorari (pp. 6–7): "The question of whether or not the prices of Respondents were made in good faith to meet the equally low prices of competitors is the only question involved in this case."

2. RESPONDENTS' USE OF A BASING-POINT SYSTEM OF DELIVERED PRICES

The price system employed by respondents is, as has been stated, inherently discriminatory, since it is a system of delivered prices for goods manufactured in and shipped from Decatur, Illinois, whereby the delivered prices are determined by taking a Chicago price and adding

the equivalent of freight from Chicago to destination, thus creating a series of differences in delivered prices in different localities which are not due to differences in cost of delivery. Respondents have systematically withheld due allowance for differences in cost of delivery from their plants located at places other than Chicago and have translated such action into varying net prices f. o. b. plant—prices which constitute a pattern of systematic discrimination. The discriminatory price disadvantage to which this system subjects purchasers in cities to which freight rates are less from Decatur than Chicago has been shown *supra*, pp. 7–8.

In attempting to justify this discrimination, respondents introduced evidence, by stipulation, describing briefly the history of their pricing system. That evidence, it is submitted, far from justifying the practice as one adopted in good faith to meet the equally low price of a competitor, discloses that the practice was adopted for very different reasons. This evidence recited that in 1920, when respondents first produced and endeavored to sell corn syrup they found that syrup manufactured by competitors "was being sold at delivered prices in the various markets of the United States; that * * * in Chicago two large factories were manufacturing such syrup and delivering it in Chicago at prices lower than prices then existing in any other market; that the delivered price in such other markets was generally equal to the

Chicago price plus the published freight rate on such syrup from Chicago to destination." (R. 18.) This evidence merely shows that when respondents entered the industry they found in operation a pricing system which, if followed, must inevitably produce exact identity in prices of glucose of the several producers when sold in any city of the United States.

At first respondents' product was unknown and could not be sold at the market price, and therefore they made their sales "by first quoting the same prices as were quoted by competitors and then making whatever reduction in price * * * was necessary to obtain business" (R. 18). This evidence shows that from the beginning respondents attempted to sell at prices necessarily discriminatory and, whenever they failed, sold at lower prices, apparently also discriminatory within the concept of the Clayton Act as amended. As soon as respondents found that their product would command the market price they "adopted the practice of selling at the same delivered prices as [their] competitors, whatever they might be," and have followed that practice since June 19, 1936 (R. 18).

There is nothing in this evidence to indicate that respondents were driven to adopting an inherently discriminatory pricing system in order to meet equally low prices of competitors. In 20 out of the 25 examples of discrimination between

various cities as shown in the table appearing on pages 7–8, *supra,* respondents had a freight advantage over their competitors in Chicago. (Compare the second and third columns of figures, representing freight from Chicago and Decatur, respectively.) In all such cases, therefore, respondents were discriminating in order to meet (or match) the equally high delivered prices that were calculated on a Chicago basis and were discriminating by the precise amount necessary to meet (or match) such prices. Respondents did this by including in their delivered prices the exact amount of "phantom" freight by which their actual freight from Decatur was less than the imputed freight from Chicago. In only 4 of the comparisons did Chicago have a lower cost of delivery than Decatur and in one instance the costs were the same.

The fact is that respondents are seeking to justify an entire discriminatory pricing system by reason of the fact that their price in Chicago, the lowest price which they quoted, had to meet the prices of those competitors who operated Chicago plants and who therefore did not have to bear any freight charge in selling to purchasers in that city. But it can with greater accuracy be stated that respondents' price system was adopted to meet not the lower price of competitors in Chicago but the higher price of competitors in Decatur and in all the important cities

where the freight rate from Decatur is lower than the rate from the plant of any Chicago competitor. A price discrimination is measured by the higher price to one purchaser and the lower price to another.[2] If, as was actually the case, respondents' higher prices in Decatur and elsewhere were not dictated by the lower delivered prices and lower costs of delivery of competitors, then respondents' discrimination in price against non-Chicago purchasers, representing the difference between respondents' Chicago price and their higher prices elsewhere, resulted from the inclusion of fictitious freight in the latter prices, and only to a small and unascertainable degree from meeting the price of competitors in Chicago. In all the markets in which respondents could sell at a lower delivered cost than could competitors (assuming equal production cost), they declined to quote a delivered price below that which their competitors arrived at by basing their delivered prices on Chicago. Respondents refrained from underselling competitors and chose to forego any attempt to capture the markets in which they could sell most advantageously and, instead, ad-

[2] Cf. Fetter, *The Masquerade of Monopoly* (1931), 384: "Discrimination involves a relationship. It is any difference between two compared prices, one higher than the other, and at the same time, *vice versa*, one lower than the other. The higher and the lower prices as between buyers are both alike discriminatory. Any act of discrimination may logically be viewed from either standpoint, and the factor of 'good faith' must be determined in each case by the relation of each price to the other."

hered to a price system which guaranteed that their delivered prices and those of other members of the industry would be identical in any given market. When selling in this way, neither respondents' Chicago price nor their prices elsewhere could be made "in good faith" to meet the prices of competitors, for they were made, not to meet the low prices of competitors, but to avoid and foreclose competition in price with others in the industry.

Other evidence fortifies the Commission's finding that respondents' discriminatory prices were not adopted in good faith to meet the lower prices of a competitor. Changes in respondents' prices have been made independently of changes by competitors. On various occasions since June 19, 1936, respondents have increased or reduced their prices for glucose in all markets prior to and independently of any similar increase or reduction by other sellers of glucose. (R. 23.) This evidence was stipulated and formed the basis for the Commission's finding on the point (R. 57). Nevertheless, the court below ruled that the evidence did not support the Commission's finding, and in reaching this conclusion the court speculated that respondents "may very well have known what the competitive situation in their industry was and what was certain to happen. In anticipation of what their competitors were certain to do, the companies promulgated prices to meet the foreseen competitive situation" (R. 73).

We submit that the court thus departed from the rules laid down by this Court with reference to

judicial review of orders of the Federal Trade Commission. In such a proceeding a court is forbidden "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences" (*Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73). When the facts have been stipulated, as here, "The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission" (*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63).

Other evidence relevant to the issue whether respondents acted in good faith to meet the equally low prices of competitors is found in their response to changes in freight rates. From May 7 to May 17, 1937, the freight rate from Decatur to Dallas, Texas, decreased from 72.76¢ to 68¢ per 100 pounds (R. 26), while the rate from Chicago to Dallas remained unchanged at 73¢ (Comm'n. Ex. 2, fol. p. 24). To avoid discrimination against Dallas buyers, respondents should then have lowered their Dallas price by 4.76¢ per 100 pounds; but, basing their price on Chicago, they made no change in price. (*Ibid.*) Similarly, if the freight rate from Decatur has remained unchanged while that from Chicago increased, respondents have advanced their delivered prices on the basis of the Chicago rate advance. Between August 30 and November 1, 1939, the rate from Decatur to Dallas remained unchanged while the rate from Chicago to Dallas increased 5¢ per 100 pounds. The respondents' delivered price at Dallas was

increased by an equal amount (R. 26; Comm'n. Ex. 2, fol. p. 24). These instances show how artificial is the position of respondents that their discriminatory prices were adopted in good faith in order to meet the equally low price of a competitor.

In holding that a defense had been established under the proviso in Section 2 (b) of the Act, the court below failed to consider the legislative history of that proviso, which indicates that it is to be given a restrictive and not a lax construction. As introduced, neither the House nor the Senate bill contained a provision similar to that in Section 2 of the Clayton Act, which read: "*Provided,* That nothing herein contained shall prevent * * * discrimination in price in the same or different communities made in good faith to meet competition." In the Senate an amendment was adopted incorporating this provision. 80 Cong. Rec. 6426, 6434. In the House the Judiciary Committee reported the bill with a provision substantially like that finally adopted. 80 Cong. Rec. 8139.[3] The conference rejected the Senate version and approved the House provision. The conference report stated (H. Rep. 2951, 74th Cong., 2d sess., pp. 6–7; 80 Cong. Rec. 9414): "This language [of the Senate bill] is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of

[3] A similar provision was also adopted in the Senate in order to bring it before the Conference Committee. 80 Cong. Rec. 6435, 6436.

meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission is included in subsection (b) in the conference text as follows: [quoting the present provision]." It will be seen that the new provision embodies a number of important changes. It is intended as a rule of evidence.[4] It avoids the vague phrase "to meet competition" and substitutes the narrower criterion "to meet an equally low price of a competitor".[5] It evidently does not legalize discriminatory prices which are lowered below, rather than to the level of, those of a competitor.[6] It places emphasis on individual competitive situations rather than on a general system of competition, just as in the main portion of the law the language of the Clayton Act was amended to cover not only discrimination which may "substantially * * * lessen competition" but discrimination which may tend "to injure, destroy, or prevent competition with any person" who grants or receives the benefit of the

[4] See also 80 Cong. Rec. 9903 (statement of Senator Van Nuys in presenting the conference report).

[5] For the vague generality of the former provision, cf. Note, 42 Harv. L. Rev. 680, 684, where it was suggested that "where one distributor, or one type of distributor, markets the product with greater efficiency and thereby better enables the producer to meet the competition of other producers, a discrmination in favor of such distributors might be justified."

[6] See 80 Cong. Rec. 8235 (statement of Congressman Patman in opposing the Senate provision as compared with the House provision).

discrimination.[7] The chairman of the managers on the part of the House, Congressman Utterback, emphasized the narrow scope to be given the proviso. He said (80 Cong. Rec. 9418):

> In connection with the above rule as to burden of proof, it is also provided that a seller may show that his lower price was made in good faith to meet an equally low price of a competitor; or that his furnishing of services or facilities was made in good faith to meet those furnished by a competitor. It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities, and duties. They are fixed in the other provisions of the bill. It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which

[7] The importance of this emphasis on particular competitive situations, rather than competition in the industry generally, is stressed in Gordon, *Robinson-Patman Anti-Discrimination Act*, 22 A. B. A. J. 593, 594: "The expression, in the third clause, 'to injure, destroy or prevent competition with any person' is wholly new to the anti-trust laws. It is the very heart of the new law and was intended by its sponsors to have a much more drastic meaning than the old. The test apparently may be that of injury to the competitive equality of a single individual—not to competition generally. * * *" See 80 Cong. Rec. 3113 (statement of Senator Logan for Judiciary Committee).

the competition was met lies within the latitude allowed by those limitations.

Congressman Utterback proceeded to deal specifically with the case of discrimination adopted in order to meet an illegal discrimination of a competitor, and he stated that in such a case no absolute defense would be established (*ibid.*):

> This procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.
>
> To illustrate: The House committee hearings showed a discrimination of 15 cents a box granted by Colgate-Palmolive-Peet Co. on sales of soap to the A. & P. chain. Upon a complaint and hearing before the Federal Trade Commission, this proviso would permit the Colgate Co. to show in rebuttal evidence, if such were the fact, an equally low price made by a local soap manufacturer in Des Moines, Iowa, to A. & P.'s retail outlets in that city; but this would not exonerate it from a discrimination granted to A. & P. everywhere, if otherwise in violation of the bill.
>
> But the committee hearings show a similar discount of 15 cents a case granted by Procter & Gamble to the same chain. If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination,

> then it would nullify the act entirely at the very inception of its enforcement, for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product. One violation of law cannot be permitted to justify another. * * *

This legislative history supports the view that respondents have not established a defense merely by showing that their discriminatory price system was adopted to produce prices everywhere identical with those of competitors. Indeed, the effect of respondents' position, and of the decision below, is that while the system used by competitors is illegal (see also *Corn Products Refining Company* v. *Federal Trade Commission*, decided by the same court, pending on certiorari, No. 680), the system is justified when used by respondents. In construing other provisions of the antitrust laws, the courts have held that the fact that competitors have engaged in the same illegal practices as those with which a defendant is charged is no defense.* The legislative history already discussed suggests that no change in this respect was intended by the proviso in Section 2 (b) as amended.

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* *Butterick Co.* v. *Federal Trade Commission*, 4 F. (2d) 910, 912 (C. C. A. 2), certiorari denied, 267 U. S. 602 (Clayton Act, Sec. 3); *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 308–309, 312–313 (Federal Trade Commission Act, Sec. 5); *United States Telephone Co.* v. *Central Union Telephone Co.*, 202 Fed. 66, 74–75 (C. C. A. 6), certiorari denied, 229 U. S. 620 (Sherman Act). Cf. *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 599.

Respondents have argued (Br. in Opp., p. 7) that if they had established their prices by taking their present Decatur price and adding to it the freight from Decatur to destination, the resulting price in each instance would be higher than the price now existing. From this the conclusion is sought to be drawn that "By meeting the lower price of their competitors, respondents were doing only what they were entitled to do under the law." In answer to this contention several observations should be made. In the first place, it is not remarkable that their prices would have been higher under the supposed hypothesis, since the Decatur price which would have been taken as the base includes within it "phantom" freight from Chicago, to which would then be added actual freight from Decatur itself. Secondly, the mere fact that respondents' prices are lower than they might have been under a wholly unrealistic assumption does not constitute a defense to a showing of discrimination in prices as between purchasers in different localities. Thirdly, if we turn to the fact of discrimination itself, as between, for example, purchasers in Chicago where the factory net price is lowest and purchasers elsewhere, including Decatur where the factory net price is highest, we are simply remitted to the conclusion drawn by the Commission, that the discrimination is not in truth due to the establishment of a low Chicago price in good faith to meet an equally low price of competitors there, but is due in substantial

measure to the establishment of artificially discriminatory prices throughout respondents' entire price system.

Indeed, respondents' hypothetical assumption of a system of delivered prices based on the present Decatur price and a reduction everywhere to establish prices identical with those of competitors, reproducing the present system, honeycombed with discrimination, simply exposes the unreality of the attempt to justify the discrimination under the proviso of Section 2 (b).[9] The fallacy becomes all the more striking in view of the legislative history to which reference has been made, which indicates that at most the proviso was designed to permit justification by showing that specific instances of discrimination were caused by an effort in good faith to meet particular instances of lower prices of competitors. The proviso cannot properly be converted into a justification for a fixed pattern of discriminatory prices designed to produce delivered prices identical with those of competitors. Such a system, stemming from a purpose to establish prices equally as high as those of competitors, cannot be justified on the asserted ground that the lower of the discriminatory prices within the system were established in good faith to meet the equally low price of a competitor.

[9] In finding that respondents had not made out their statutory defense that the discriminations were in good faith to meet an equally low price of a competitor, the Commission expressly excluded from its stated grounds the existence of

3. RESPONDENTS' "BOOKING" PRACTICES

Unlike respondents' system of delivered prices based on Chicago, which discriminates between purchasers according to locality, the booking practices discriminate between purchasers on an individual basis, generally according to the size of the purchaser. For a short time after each price advance, respondents allow all buyers within a period of 5 to 10 days the option of purchasing glucose at the old price if delivery be taken within a period of 30 days. Thereafter the period within which delivery may be taken is extended from 30 days to 60, 90 or 120 days in favor of the larger buyers, but generally no corresponding extension is given to the smaller buyers. The result is that the smaller buyers at times pay as much as 55 cents per 100 pounds more for glucose than their larger competitors (R. 53–54). The Commission found, and it could hardly be questioned, that in using these booking practices respondents discriminated in price among their customers, and it found that the effect of this discrimination may be substantially to lessen competition and tend to create a monopoly in the manufacture, sale and distribution of candy and mixed table

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a final consent decree against respondents entered in the United States District Court for the Northern District of Illinois in *United States* v. *Corn Derivatives Institute*, et al., Equity No. 11634 (1932). This decree enjoined respondents and other members of the industry from the agreed use of the basing-point system. (R. 58–59.)

syrups containing glucose in substantial proportions, and to injure, destroy and prevent competition with the grantors and recipients of such discriminations (R. 53, 62–63).

Respondents sought to rebut this proof of discrimination by maintaining that the lower prices were granted in order to meet competition (R. 59–60). The Commission found that this defense had not been established under Section 2 (b) (R. 60–61). A majority of the court overturned the Commission's finding and held that justification was established (R. 68–73).

In addition to the problem of establishing a defense under section 2 (b) by meeting a competitor's price known to be in itself discriminatory (see pp. 25–27, *supra*), the issue here relates to the inferences to be drawn from the stipulated evidence. The following quotations from the evidence on respondents' behalf show how unsubstantial was the testimony on which they relied to justify their action (R. 22–23):

> On several occasions * * * a salesman or broker of the Staley Company has informed us that one or more of our competitors had granted to one or more customers extensions of time within which to take delivery of syrup formerly booked at the older and lower price. * * * *The information * * * was unsupported except by the verbal statement of the buyer or buyers to the salesman or broker.* The

Staley Company, believing such report to be true, has then granted similar extensions * * *.

* * * * *

* * * Subsequent to [an advance in our price] on several occasions candy manufacturers have informed the Staley Company *verbally and without supporting evidence,* that one or more of our competitors had * * * told them that without the knowledge of the buyer an order had been entered * * * for the buyer, and that our * * * competitors were prepared to make delivery at the older and lower price. The buyer offered us the business and the order was accepted. * * *

On several occasions since June 19, 1936, Respondent has received reports from tank wagon buyers that competitors had offered to sell them tank cars of syrup and to deliver such syrup in tank wagon lots at a later time. Such reports came *in the form of verbal statements of the buyer* to Respondent or to salesmen of the Respondent. Respondent believing such reports to be true, has sold such tank wagon buyers tank car lots at the older and lower price subsequent to a price advance * * *. Such deliveries were made for several months subsequent to the price advance. At the time such deliveries were made Respondent has, on some occasions, delivered syrup to competing buyers at the newer and higher price. [Italics supplied.]

Respondents in fact admitted that they made sales under bookings reported by their salesmen although they suspected that "such bookings for customers were made without the knowledge of the buyer * * *" (R. 22).

Under Section 2 (b), in justifying discrimination, a buyer must show that his lower price "was made in good faith".[10] The Commission is not required to prove bad faith. The burden of "rebutting the prima facie case" is upon the person charged with the violation (Section 2 (b)). We submit that the Commission properly held that respondents did not sustain that burden.

The Commission's own appraisal of the evidence shows that it by no means imposed an impossible or unduly burdensome task on respondents in order that the defense under Section 2 (b) might be proved. The Commission stressed the lack of any verifying evidence to support the self-serving assertion that respondents believed that competitors had granted similar discriminations in the particular instances where they were granted by respondents. The Commission pointed out that to rely upon representations made by buyers con-

[10] Good faith has been defined in numerous contexts to require an honest effort to ascertain the facts and the absence of circumstances calculated to put an ordinarily prudent man upon inquiry. *Colket* v. *St. Louis Trust Co.*, 52 F. (2d) 390, 391 (C. C. A. 8); *Siano* v. *Helvering*, 13 F. Supp. 776, 781 (D. N. J.); *Allen* v. *Pioneer-Press Co.*, 40 Minn. 117, 125; *Cochran* v. *Fox Chase Bank*, 209 Pa. 34, 39; *Pinkerton* v. *Bromley*, 119 Mich. 8, 10–11.

cerning offers by competing sellers, without further inquiry, is to ignore the common practice of buyers to bargain for the most advantageous prices and terms of sale. Moreover, the Commission had before it evidence showing that respondents in other connections did not always act in changing prices after similar action by competitors, but on occasion initiated price changes (see p. 21, *supra*). The Commission's discussion of the evidence sufficiently discloses the reasonable basis upon which the Commission found that respondents had not sustained the burden of proving their defense (R. 60–61):

> (f) * * * There may be circumstances under which a seller cannot conclusively determine at the time or later definitely show that he in fact met a lower price. The statute does not impose an impossible burden upon the seller, but in the opinion of the Commission, in the absence of conclusive proof, it does require that a seller affirmatively show that he did not lightly grant discriminatory prices but first diligently sought, by means reasonably within his command, to determine whether or not in granting a lower price he would in fact be meeting an equally low price of a competitor. The existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would be meeting an equally low price of a competitor should be shown, as well as the exercise of diligence to ascertain such

facts. In appropriate instances this might include the seller's previous experience with or knowledge of the buyer's character and reliability. It is common knowledge that buyers seek to secure the most advantageous prices and terms of sale possible, and reliance by a seller upon representations of buyers concerning offers by other sellers should be tempered by this knowledge.

(g) The showing actually made by respondents in this proceeding indicates that they readily granted discriminatory prices upon unsupported verbal statements of buyers made to them or their salesmen or brokers. It does not appear that respondents made any effort to verify the existence of a lower price by other sellers. There is no showing of substantial reasons respondents had for believing the unsupported representations said to have been made by buyers, and the bare assertion of belief merely purports to reflect a condition in the seller's mind which cannot be appraised unless the reasons for such belief appear. In fact, in some instances respondents have granted discriminatory prices in circumstances which strongly suggested that the buyers' claims were without merit. There is no general showing that respondents sought to so conduct their business as to prevent unwarranted discriminations in price.

(h) The Commission concludes that respondents have failed to establish affirmatively that the discriminatory prices

granted by them through variations of the "booking" practice were made in good faith to meet an equally low price of a competitor within the meaning of subsection (b) of Section 2 of the statute, and therefore so finds.

In rejecting the Commission's finding, the decision below is in conflict with the decisions of this Court heretofore cited (*supra*, p. 22), holding that it is for the Commission to appraise the evidence as a whole and, even where the evidence is stipulated, to make the appropriate inferences.

CONCLUSION

For the reasons stated the decision of the court below should be reversed.

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